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No. 05-1076

Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN Y. PADOT,

Petitioner,

v.

BRENDA G. PADOT,

Respondent.

On Petition For A Writ Of Certiorari To The Second District Court Of Appeal Of Florida

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to S. Ct. R. 15.8, Petitioner responds to the brief filed by the Solicitor General at the Court's invitation ["U.S. Br."]. While Petitioner is mindful that the Court usually accepts the government's suggestion to deny review in a particular case,[1] insofar as the Solicitor General's recommendation here is premised on three false assumptions, the Court should nonetheless grant review.

1. The first, and most significant, misapprehension by the government is reflected throughout its brief: that Petitioner had unconditionally agreed to pay his former spouse 33.96% of all his military retired pay. See U.S. Br. (i), 3, 7. In actuality, Petitioner agreed to pay Respondent that proportion of his *disposable* retired pay, as defined by federal law, in the Uniformed Services Former Spouses' Protection Act (USFSPA), see 10 U.S.C. § 1408(a)(4), and Florida law, see Fla. Stat. Ann. § 61.076(2)(c). This is confirmed in paragraph 2(B)(12) of the March 17, 1995, Supplemental Order dividing the marital estate. See Pet. App. 16a-17a. Disposable retired pay, as the government concedes, see U.S. Br. 2, excludes amounts waived in order to receive military disability pay.

The distinction between "retired pay" and "disposable

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[1] But see *Laboratory Corp. of Am. Holdings v. Metabolite Laboratories, Inc.*, 126 S.Ct. 543 (2005) (certiorari granted despite adverse recommendation of SG; later DIG'ed on grounds not related to SG's objection); *Bank of China v. NBM LLC*, 125 S. Ct. 2956 (2005) (same; later Rule 46.1 dismissed); *Bates v. Dow Agrosciences LLC*, 542 U.S. 936 (2004) (same; decided); *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 540 U.S. 1175 (2004) (same; decided); *South Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 539 U.S. 957 (2003) (same; decided).

retired pay" is crucial to this case. The Supplemental Order, at issue here, is a boiler-plate document, endorsed no less than by the American Bar Association. See Gale S. Finley, ASSIGNING RETIREMENT BENEFITS IN DIVORCE: A PRACTICAL GUIDE TO NEGOTIATING AND DRAFTING QDROS (ABA; 2d ed. 1999). Even more pertinently, the Florida act that requires that a final court judgment dividing military retired pay must be "expressed in dollars or as a percentage of the disposable retired or retainer pay," Fla. Stat. Ann. § 61.076(2)(c), is replicated in many other state statutes and decisional law.[2]

2. The government also asserts, U.S. Br. 17, that Petitioner's arguments, based on the anti-attachment provisions of 38 U.S.C. § 5301(a), were not raised below. This is untrue. They were raised initially before the Florida Circuit Court, see Former Husband's Amended Motion for Rehearing & Clarification, at 1-2 (¶¶ 3 & 6) (Jan. 17, 2003), and more particularly in the Florida Court of Appeals in Petitioner's opening brief before that court. See Appellant's Amended Initial Brief, at 17 ("military retirement benefits . . . are protected from creditors or anyone else who would 'anticipate' the receipt of benefits by an anti-attachment provision. Similarly, the only exception to this statutory anti-attachment provision is to satisfy a legal obligation for child support or alimony.") (citations omitted) (Nov. 26, 2003).

As for the merits of Petitioner's anti-attachment contention, the government blithely ignores the controlling statutory provision, when it asserts (U.S. Br. 18) that offsets

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[2] See, e.g., Ind. Code § 31-9-2-98(b)(3) (2006); Me. Rev. Stat. Ann. tit. 19-A, § 2604 (2006); W. Va. Code §§ 48-7-104 et seq. (2006); *McHugh v. McHugh*, 861 P.2d 113, 114 (Idaho 1993); *Goodson v. Goodson*, 744 A.2d 828, 829 (R.I. 2000).

against non-disability pay income, such as were ordered here, are perfectly permissible. In 2003, after the Florida Circuit court entered its judgments, see Pet. App. 20a, 23a, but before the Florida Court of Appeals issued its ruling, Pet. App. 1a, Congress amended the veterans benefits anti-attachment law to cover the circumstances presented here. See Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, codified at § 5301(a)(3)(A); App. 33a ("clarify[ing] that, in any case where a beneficiary... enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation . . . such agreement shall be deemed to be an assignment and is prohibited.").[3] The anti-attachment issue was preserved below, and merits review here.

3. The balance of the government's brief is devoted to the pursuit of a chimerical doctrinal distinction between state court decisions which enforce the contractual allocation of military disability pay received in lieu of retired pay, as opposed to those orders based on equitable grounds. While the Solicitor General grudgingly concedes, U.S. Br. 10, that there is a conflict in authority on the equitable theory, he contends that there is not on the application of state contract-law, which, he argues, is the basis presented in the decision below. Neither the factual premise, nor the legal conclusion, of this assertion is correct.

For starters, the decision below is, in fact, premised on a blend of equitable and contract idioms. See Pet. App. 2a, 3a ("The trial court found that the situation was inequitable. . . ."), 9a ("we find no error in the trial court's conclusion 'that equity

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[3] As the government notes, U.S. Br. 17 n.9, this provision was cited to the Florida Court of Appeals, albeit on rehearing, which was the first opportunity that Petitioner had after its codification.

requires that the former wife be made whole given the totality of the situation concerning the husband's voluntary acts and his ability to supplement and make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife'."). Moreover, insofar as the Florida appeals court relied on *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), see Pet. App. 3a, 4a n.1, 6a-7a, that decision likewise mixes equitable and contract principles. See id. at 239 ("We reach this conclusion because the final judgment in the present case does not transgress the USFSPA and *Mansell*, which exclude veterans' disability benefits from equitable distribution or assignment via property settlement agreement.").

And while the Solicitor General makes light, see U.S. Br. 16, of the absence of an express indemnification agreement here, that is positively crucial in establishing that this case truly does involve state courts applying equity to avoid what would otherwise be the preemptive effect of federal law. See *Ex Parte Billeck*, 777 So. 2d 105, 109 (Ala. 2000) ("The agreement does not contain an indemnification provision to protect the monthly sum the wife would receive should the husband's military retirement benefits be reduced.") (expressly distinguishing *Abernethy*). To the extent that the government asserts that the generic provisions of the Supplemental Order, are, in fact, a contractual promise to indemnify former spouses in the event that disability pay is elected, the Solicitor General's distinction between equitable and contractual theories dissolves into a gooey solepcism. The government appears[4] to counsel here that

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[4] The government's position asserted here contradicts that taken in the Department of Defense's 2001 *Report to Congress Concerning Federal Former Spouse Protection Laws*, http://www.dod.mil/prhome/spouserev.html, at 81 ("for each dollar of VA disability compensation awarded, the member's disposable

USFSPA section 1408(a)(4) has no preemptive effect, even when directly incorporated into state law, as in Florida.

Moreover, the schism in state authority on these issues is deeper and wider than the government cares to admit. Happily, the Court need not take Petitioner's word for this; the split has been noticed in a number of recent state court rulings. See, e.g., *Marriage of Landis*, 113 P.3d 456, 458 (Or. App. 2005) ("A few courts have concluded that the line [between division of disability pay and fashioning a just division of property] is not fine at all, but nonexistent – a fiction."). It is time for the Court to lay this fiction to rest.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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retired pay is also reduced one dollar. In cases where the member receives a 100 percent disability rating, all payments to the former spouse may cease. This result is due to the provisions of the VA Disability Compensation System – not [USFSPA]."), App. F, at 6-7. The Solicitor General admits, U.S. Br. 18-19 n.11, that of the nearly .8 million divorced veterans concurrently receiving retired and disability pay, 600,000 are potentially impacted by this decision.